

# A Proposal for Democratically Financed Congressional Elections

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Ever since 1905, when President Theodore Roosevelt proposed to Congress that “[a]ll contributions by corporations to any political committee or for any political purpose should be forbidden by law,”<sup>1</sup> American political reformers have been proposing to break the bond between special-interest money and electoral politics by regulating the way candidates raise money to campaign for elective office. Since Teddy Roosevelt’s call, Congress has passed no fewer than twelve different bills to reform the campaign finance system. The first of these bills, the Tillman Act of 1907, was a direct result of Roosevelt’s effort.<sup>2</sup> It sought to prohibit campaign contributions from corporations. In addition to offering no provisions for enforcement, the Act nullified the intent of its prohibition against corporate contributions by allowing individual contributions from corporate stockholders and executives.

Subsequent reform legislation followed the same pattern: insufficient provisions for administration and enforcement and sufficient loopholes to undermine the regulations on campaign contributions. “More loophole than law, they invite evasion and circumvention” is how President Lyndon Baines Johnson described the 1925 Federal Corrupt Practices Act<sup>3</sup> and the 1940 Hatch Act<sup>4</sup> which were ostensibly in effect during his term of office.<sup>5</sup> The same could be said about every other piece of campaign finance reform legislation to the present.<sup>6</sup>

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1. Theodore Roosevelt, Fifth Annual Message (Dec. 5, 1905), in *THE THEODORE ROOSEVELT CYCLOPEDIA* 63 (Albert B. Hart & Herbert R. Ferleger eds., 1941).

2. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864 (1907).

3. Federal Corrupt Practices Act, ch. 33, 37 Stat. 25 (1925) (codified as amended at 18 U.S.C. §§ 591, 597, 599 (1988)).

4. The Hatch Act Amendments, ch. 640, 54 Stat. 767 (1940) (codified as amended at 18 U.S.C. § 594 (1988)).

5. President Lyndon B. Johnson, Message to Congress (May 25, 1967), in *CONGRESSIONAL QUARTERLY, DOLLAR POLITICS* 6 (3d ed. 1982) [hereinafter *DOLLAR POLITICS*]; see also HOWARD R. PENNIMAN & RALPH K. WINTER, JR., *AMERICAN ENTERPRISE INSTITUTE, CAMPAIGN FINANCE: TWO VIEWS ON THE POLITICAL AND CONSTITUTIONAL IMPLICATIONS* 6 (1971).

6. *DOLLAR POLITICS*, *supra* note 5, at 3-16, 23, summarizes this legislation. The first Publicity of Political Contributions Act, ch. 392, 36 Stat. 822 (1910) (codified as amended at 2 U.S.C. § 431 and 18 U.S.C. §§ 591, 597, 599 (1988)), required national parties and interstate committees involved in House campaigns to make post-election reports of campaign contributions. Lacking powers of verification and enforcement, it proved meaningless. The Act was amended in 1911 to extend disclosure requirements to Senate campaigns and limit House and Senate campaign expenditures. Act of Aug. 19, 1911, ch. 33, 37 Stat. 25 (1911). Again, there was no mechanism for effective enforcement. The Federal Corrupt Practices Act, *supra* note 3, revised existing campaign finance legislation and served as federal law until 1971. It changed House and Senate spending limits and mandated disclosure of expenditures and contributions by candidates for the Senate and the House and for committees that sought to influence federal elections in

Current campaign finance regulations are based on a series of reforms enacted during the 1970s. The Federal Election Campaign Act (FECA) of 1971<sup>7</sup> and the Presidential Election Campaign Fund Act of 1971<sup>8</sup> authorized a system of voluntary public financing for presidential elections funded by an optional one-dollar check-off on income tax returns. Under this system, presidential candidates who agree not to spend private money during the general election receive public financing; candidates who reject public financing are allowed to raise campaign money from private sources.

Coming in the aftermath of the Watergate scandal, the 1974 Amendments to the FECA<sup>9</sup> represent the boldest efforts at campaign finance reform ever attempted. Although public pressure for reform was not organized, public outrage against the excesses of the existing system was palpable. One public opinion poll at the time indicated that sixty-five percent of Americans were in favor of banning campaign contributions from private sources and adopting a system of public financing.<sup>10</sup> Although such broad reform was not enacted, the 1974 law did extend public financing to the presidential primary, establishing a system of federal matching grants for eligible presidential candidates in primary races.<sup>11</sup> For congressional elections, the law established contribution limits for individuals and political action committees (PACs).<sup>12</sup> It also established spending limits on individual congressional campaigns, as well as limits on the amount of money a national party could spend on a candidate's behalf.<sup>13</sup> In addition, the law placed a limit on what individual contributors could spend on an "independent expenditure." An independent expenditure is a campaign expenditure by an individual or a political committee "expressly advocating the election or defeat of a clearly identified candidate which is made

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two or more states. Because administration was vested in the Clerk of the House and the Secretary of the Senate, neither of whom had the statutory power of independent enforcement, the Act was routinely ignored. The Hatch Act Amendments, *supra* note 4, limited campaign contributions to candidates and national political committees, and expenditures of multi-state committees. The legislation applied to the primary, as well as to the general election. However, individuals could give the maximum contribution to multiple committees, each working for the same candidate. Again, the statute lacked an enforcement mechanism. The War Labor Disputes Act, ch. 142, 57 Stat. 163 (1943), was passed over President Franklin Delano Roosevelt's veto. In addition to restricting workers' right to strike during the wartime emergency, § 3, it extended the prohibition of political contributions by national banks and corporations to labor unions, § 9. The Taft-Hartley Act, ch. 120, § 304, 61 Stat. 136, 159 (1947), made the campaign financing restrictions of the War Labor Disputes Act permanent. The Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497 (1971), the Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3 (1971), and the FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974), 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976), and 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1979), are discussed in the text.

7. FECA of 1971, *supra* note 6.

8. Revenue Act of 1971, Pub. L. No. 92-178, §§ 9002-9013, 85 Stat. 562-72 (1971).

9. FECA of 1974, *supra* note 6.

10. DOLLAR POLITICS, *supra* note 5, at 12.

11. FECA of 1974, *supra* note 6, § 408.

12. *Id.* § 101.

13. *Id.*

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without cooperation or consultation with any candidate” or a candidate’s organization or staff.<sup>14</sup> To administer and enforce these and other provisions, the law created a six-member Federal Election Commission (FEC).<sup>15</sup>

The 1974 FECA went into effect on January 1, 1975 and was immediately challenged in the courts by an unlikely coalition of plaintiffs including the conservative Republican Senator James L. Buckley of New York, former Democratic Senator Eugene McCarthy, the New York Civil Liberties Union, and the right-wing publication *Human Events*. On January 30, 1976, in *Buckley v. Valeo*,<sup>16</sup> the U.S. Supreme Court upheld the limits on campaign contributions from individuals and political action committees<sup>17</sup> and the principle of voluntary public financing for presidential elections.<sup>18</sup> But the Court struck down limits on the amount of personal money candidates could spend on their own campaigns, mandatory caps on the total amount candidates are allowed to spend on their campaigns, and limits on contributions by individuals or political action committees for independent expenditures, holding that such restrictions were unconstitutional infringements of candidates’ and contributors’ First Amendment right to free speech.<sup>19</sup>

The 1976 FECA Amendments<sup>20</sup> attempted to bring provisions of the 1974 Act into accord with *Buckley v. Valeo*. In an attempt to control the amount of money going into independent expenditures, the Amendments included a provision mandating that individuals and political action committees spending more than \$100 to promote a candidate or party declare that the contribution was made without the collusion of any candidate or party official.<sup>21</sup>

The 1976 presidential election between President Ford and Jimmy Carter was conducted under this system of total public financing. The public money went directly to the national campaign committees of candidates Ford and Carter, greatly diminishing local and state party activity on behalf of each presidential candidate. To remedy this problem and encourage a revival of grassroots political activity, the FECA Amendments of 1979<sup>22</sup> allowed local and state political party organizations to raise and spend private contributions for campaign materials and volunteer activity to promote their federal candidates. This provision, though well-intentioned, resulted in the creation of the “soft money” loophole. Presidential candidates who opted for public financing could now spend, in addition to their public stipend, unlimited amounts of soft

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14. 2 U.S.C. § 431(17) (1988).

15. *Id.* § 208.

16. 424 U.S. 1 (1976).

17. *Id.* at 30.

18. *Id.* at 104.

19. *Id.* at 24.

20. Pub. L. No. 94-283, 90 Stat. 475 (1976).

21. *Id.* § 104.

22. Pub. L. No. 96-187, 93 Stat. 1339 (1980).

or "non-federal" money (i.e., money contributed by private individuals or organizations to state or local party organizations which is not covered by the regulations for federal campaign finance law). The existence of this loophole, which is eagerly and unashamedly exploited by both major parties, nullifies the prohibition on private fundraising by publicly financed presidential candidates. Congressional candidates also raise and spend soft money gathered by local and state political parties from private sources, thus minimizing the effect of those FECA provisions upheld by *Buckley* that limit campaign contributions from individuals and political action committees.<sup>23</sup>

The FECA reforms of the 1970s have been in operation for more than a decade. We contend that they are conceptually flawed and have not achieved their intended purpose. It is true that corruption is no longer blatantly accepted. "Bag men" representing special interests no longer deliver bags of cash to the members of Congress whom they seek to influence. The reforms of the 1970s tightened the rules for disclosure and, in establishing the FEC, created an administrative body to collect campaign finance data.

However, disclosure is perfunctory and enforcement lax. Not until well after an election is over does the public learn the aggregate amount of money individuals and political action committees spent on favored politicians. According to the Center for Responsive Politics' FEC Watch, at the end of 1990 the campaign contributions of only one PAC had been audited for the 1989-90 election cycle, and sixty-five percent of the more than 250 enforcement matters were still unresolved for that same period.<sup>24</sup>

More critically, however, the FECA reforms have done nothing to stem the cost of running in a federal election and the amount of special interest money that candidates for Congress are raising and spending. Indeed, since 1976, campaign expenses have increased far beyond the rate of inflation. In 1974, the total cost of all campaigns for the House and Senate was \$77 million.<sup>25</sup> In 1992, that cost had risen to \$678 million—forty percent higher than the cost of congressional elections two years earlier.<sup>26</sup>

Nor have the FECA reforms curbed political contributions by special interest groups. In 1976, the combined contributions from political action

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23. For discussions of soft money, see LARRY MAKINSON, CENTER FOR RESPONSIVE POLITICS, OPEN SECRETS, SECOND EDITION: THE ENCYCLOPEDIA OF CONGRESSIONAL MONEY AND POLITICS 16-17 (1992) [hereinafter OPEN SECRETS]; JOSHUA GOLDSTEIN, CENTER FOR RESPONSIVE POLITICS, THE \$43 MILLION LOOPHOLE: SOFT MONEY IN THE 1990 ELECTIONS 10-11 (1991) [hereinafter \$43 MILLION LOOPHOLE]; CENTER FOR RESPONSIVE POLITICS, SOFT MONEY '88 10-12 (1989).

24. CENTER FOR RESPONSIVE POLITICS, FEC WATCH PROJECT, JUSTICE DELAYED, JUSTICE DENIED: THE FEDERAL ELECTION COMMISSION'S ENFORCEMENT RECORD 1 (1992) [hereinafter JUSTICE DELAYED].

25. CENTER FOR RESPONSIVE POLITICS, SPENDING IN CONGRESSIONAL ELECTIONS: A NEVER-ENDING SPIRAL 2 (1988) [hereinafter NEVER-ENDING SPIRAL].

26. Federal Election Comm., Press Release, 1992 Congressional Election Spending Jumps 52% to \$678 Million (Mar. 4, 1993).

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committees for all House and Senate races totalled \$20.5 million.<sup>27</sup> By 1992, that figure had jumped to \$188.7 million.<sup>28</sup> These figures underestimate the amount of special-interest money flowing into the campaign coffers of candidates for Congress, for individual contributors often represent special interest groups too. The amount of individual contributions far exceeds that of PACs—in 1992 the ratio was almost 2:1.<sup>29</sup> The most recent congressional data, from the 1992 elections, indicates that successful Senate incumbents raised 42.8% of their money from individuals giving \$200 or more, and only 17.3% in contributions of less than \$200.<sup>30</sup> For successful House incumbents the numbers are 27.2% for contributions of \$200 or more and 18.5% for contributions under \$200.<sup>31</sup>

Because of the inadequacies of FECA-mandated disclosure, it is difficult to trace the special interests behind individual contributions. All available evidence, however, indicates that the bulk of the money from large contributors comes from the financial reserves of wealthy financiers, corporate executives, real estate tycoons, lawyers, lobbyists and show business millionaires, and not from the pockets of ordinary working-class and low- and middle-income Americans.<sup>32</sup>

In addition to disguising the amount of individual contributions coming from wealthy individuals with direct financial stakes in the deliberations of Congress and the work of government, FEC data does not count substantial soft money contributions, laundered through state and local parties for use by individual congressional candidates. In the most comprehensive study of soft money to date, the Center for Responsive Politics uncovered a total of \$43.5 million in soft money contributions made during the 1989-90 election cycle to the Democratic and Republican parties in just nine states.<sup>33</sup> Business entities contributed over \$16.3 million; individuals (many of them representing

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27. NEVER ENDING SPIRAL, *supra* note 25, at 10-11.

28. LARRY MAKINSON, CENTER FOR RESPONSIVE POLITICS, PACS IN PROFILE: INDUSTRY AND INTEREST GROUP SPENDING IN THE 1992 ELECTIONS 2 (1993) [hereinafter PACS IN PROFILE 1992].

29. Center for Responsive Politics, Analysis of Federal Election Commission Records (unpublished analysis, on file with the Center for Responsive Politics).

30. *Id.* According to Makinson's data, 14 members of Congress raised more than half of their campaign contributions from individuals giving less than \$200. OPEN SECRETS, *supra* note 23, at 6.

31. *Id.*

32. *Id.* at 22-27. For example, the Center for Responsive Politics has identified 75% of the individual contributors who donated more than \$200 to congressional candidates in the 1990 election. Individuals connected with the finance, insurance, and real estate industries were the biggest givers, accounting for \$16.5 million overall. Lawyers and lobbyists accounted for over \$14 million. Individuals identified as ideological contributors gave \$5.9 million, with conservatives outgiving liberals \$939,297 to \$871,991. Individuals identified as connected to organized labor gave just \$100,000. By contrast, individuals connected to 13 separate corporate entities, including law and public relations (lobbying) firms, media and entertainment, banking, investments, and wine and spirits (E&J Gallo Winery), gave over \$100,000 per entity. Individuals connected to Time Warner alone gave \$337,800; those connected to the investment banking firm of Goldman, Sachs & Co. gave \$279,850. *Id.* at 26-27.

33. \$43 MILLION LOOPHOLE, *supra* note 23, at 13. The states studied were Colorado, Hawaii, Illinois, Iowa, Kentucky, Minnesota, North Carolina, Oregon, and Texas.

business interests) contributed \$14.9 million. Labor unions, by contrast, accounted for just \$2.8 million.<sup>34</sup> Sixty-seven soft money donors in this study contributed more than \$100,000 to state and local party committees within the nine states.<sup>35</sup>

Soft money also includes contributions to national party committees for mixed party activities on state and federal levels. According to the Center for Responsive Politics, \$83.4 million was given to the two major national parties during the 1992 federal election, more than half of which represented contributions of \$50,000 or more.<sup>36</sup>

### I. REQUIREMENTS FOR MEANINGFUL CAMPAIGN REFORM

To reflect democratic values and make our electoral system conform more closely to the principle of one person/one vote and to Abraham Lincoln's cherished ideal of government of the people, by the people, and for the people, a meaningful system of campaign finance reform must at a minimum:

(1) Eliminate wealth, or access to it, as a decisive factor in a political candidate's electoral victory.

(2) Create a financially level playing field so that all qualified candidates have equal financial resources to conduct competitive campaigns.

(3) Break the hold that wealthy individuals and other monied interests have over the electoral and governmental processes.

(4) Relieve candidates from the burden of constant fundraising and enable elected officials to spend more time on their public duties.

(5) Be free of loopholes. The history of campaign finance reform indicates that piecemeal reform is ineffective. A single loophole can destroy reform.

#### A. *Money Is the Key to Political Success*

Despite the campaign reforms of the 1970s, the candidates who raise and spend the most money continue to be elected to political office. In the 1992 congressional elections, for example, the winning candidates for election to the House of Representatives spent an average of \$543,599 while losers spent an average of \$201,263.<sup>37</sup> In Senate races, winners outspent losers by an

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34. *Id.* at 14.

35. *Id.* at 15-16.

36. JOSHUA GOLDSTEIN, CENTER FOR RESPONSIVE POLITICS, *SOFT MONEY, REAL DOLLARS: SOFT MONEY IN THE 1992 ELECTION* 1 (1993).

37. CENTER FOR RESPONSIVE POLITICS, *THE PRICE OF ADMISSION: CAMPAIGN SPENDING IN THE 1992 ELECTIONS* 8 (1993) [hereinafter *PRICE OF ADMISSION 1992*].

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average of \$3,930,638 to \$2,034,980.<sup>38</sup> In these same elections, only forty-seven House candidates and five Senate candidates spent less money than their opponents and won.<sup>39</sup>

Money plays a decisive role in all stages of the electoral process. Individuals contemplating a run for office must first ascertain their chances of raising enough money to wage a serious campaign. In earlier times, party bosses often selected the candidate who received party support, as deals were cut in smoke-filled rooms. By reducing the role of often-corrupt party bosses and regulating the system of campaign finance, the FECAs of the 1970s put gatekeeping power into the hands of political fundraisers and their network of wealthy individuals and political action committees. Like the party bosses of old, these large campaign contributors have become power brokers. By giving politicians the necessary early money to organize their campaigns, they effectively screen prospective candidates before the election even begins.

The high cost of campaigning and the access some candidates have to large contributors discourages many qualified women and men from running for office. Incumbents often amass huge war chests of campaign contributions in one election in order to discourage serious challengers in the next election.<sup>40</sup> Yet, the ability to raise money does not necessarily reflect the required skills of an accomplished legislator. Elections are the centerpiece of our democracy. Ballots rather than dollars should be the determinant of political success.

### *B. Reform Must Create a Level Playing Field*

Dependence upon campaign contributions from private sources encourages noncompetitive elections. This is especially true in the U.S. House of Representatives where, since 1974, the rate of reelection has been eighty-eight percent and higher.<sup>41</sup> Barring criminal malfeasance, once elected, members can usually remain in office as long as they desire, or as long as they remain in the good graces of their large campaign contributors. A decisive factor in the advantage of incumbency is the ease with which incumbents raise money to spend on reelection. In 1992, House incumbents spent 300% more than their challengers.<sup>42</sup> In the Senate, the difference between incumbents and challen-

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38. *Id.*

39. Center for Responsive Politics, Analysis of Federal Election Commission Records (unpublished analysis, on file with the Center for Responsive Politics).

40. CENTER FOR RESPONSIVE POLITICS, PRICE OF ADMISSION: CAMPAIGN SPENDING IN THE 1990 ELECTION 24, 39 (1991).

41. For reelection rates from the years 1974 through 1990, see OPEN SECRETS, *supra* note 23, at 5. For the 1992 election, see PACS IN PROFILE 1992, *supra* note 28, at 5.

42. Center for Responsive Politics, Analysis of Federal Election Commission Records (unpublished analysis, on file with Center for Responsive Politics). The dollar figure for the House of Representatives was an average of \$578,025 for incumbents and \$169,207 for challengers. Between 1974 and 1986, the spending disparity between House winners and losers ranged from 46% to 174%. NEVER-ENDING SPIRAL,

gers was 400%.<sup>43</sup> Only a system in which qualified challengers and incumbents have equal financial resources (and enough financial resources to enable the challenger to become as well-known as the incumbent) would create the condition for fair and competitive elections.

### C. *Big Money Has Undue Influence Over Public Policy*

Despite limits on campaign contributions, special interests pour millions of dollars into candidate coffers, just as they did before the FECA reforms. Figures for the 1992 election indicate that political action committees representing the finance, real estate, and insurance industries contributed \$29.4 million,<sup>44</sup> while the agriculture industry contributed \$15.8 million and the health care industry gave \$14.8 million. Political action committees representing business interests gave \$127 million in 1992, while PACs affiliated with labor unions gave \$43 million.<sup>45</sup> With health care reform on the top of the political agenda, the contributions of the health care industry are rising above those of any other sector: the American Medical Association (AMA), with its contribution of \$3,237,153, was the leading PAC contributor in the 1992 elections.<sup>46</sup> Health and insurance PACs contributed \$3.9 million to congressional incumbents during the first six months of 1993, while contributions from all other PACs decreased during the same period.<sup>47</sup>

Special-interest campaign contributions do not generally go to candidates as a testament of the contributor's commitment to democracy. On the contrary, special interests usually target their contributions to those candidates who sit on legislative committees that deal with public policy of the special interests' concern. For example, agribusiness interests give to incumbents on the agriculture committee, construction firms give to members sitting on public works committees, industries with pollution problems give to incumbents on environmental committees, and so forth.<sup>48</sup>

Legislators often strive for a bipartisan consensus in policy legislation. But

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*supra* note 25, at 16-17.

43. Center for Responsive Politics, Analysis of Federal Election Commission Records (unpublished analysis, on file with Center for Responsive Politics). For 1992 Senate races, incumbents spent an average of \$4,174,034; challengers spent \$905,796. Between 1974 and 1986, the spending disparity between Senate winners and losers ranged from 38% to 93%. NEVER-ENDING SPIRAL, *supra* note 25, at 16-17.

44. PACs IN PROFILE 1992, *supra* note 28, at 20.

45. *Id.* at 3.

46. *Id.* at 9. The AMA was followed by the National Association of Realtors, the Teamsters Union, the Association of Trial Lawyers of America, the National Education Association, the United Auto Workers, the American Federation of State, County and Municipal Employees, the National Auto Dealers Association, the National Association of Letter Carriers, the National Rifle Association, and the American Bankers Association.

47. Center for Responsive Politics, Analysis of Federal Election Commission Records (unpublished analysis, on file with Center for Responsive Politics).

48. See, e.g., OPEN SECRETS, *supra* note 23, at 22-39; CENTER FOR RESPONSIVE POLITICS, PAC CONTRIBUTION PROFILE OF THE HOUSE BANKING COMMITTEE (1991).



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when the two major parties are financed by similar, or the very same, special interests, it is reasonable to question the basis for that political consensus. Too often such a consensus is based not on the soundness of the legislation but on a convergence of powerful monied interests who stand to gain from a particular legislative proposal. At the very minimum, big contributors enjoy better access to Congress than do individual voters. As former Congressman Michael Barnes (D-MD) explained:

You have to make a choice. Who are you going to let in the door first? You get back from lunch. You've got fourteen phone messages on your desk. Thirteen of them are from constituents you've never heard of, and one of them is from a guy who just came to your fundraiser two weeks earlier and gave you \$2,000. Which phone call are you going to return first?<sup>49</sup>

Campaign contributions influence Congress not only in terms of how members vote, what issues they raise, what programs they push, and what fine print they include in the bills, but also, as former Senator William Proxmire has pointed out, in terms of what members of Congress do *not* do: in the issues they do *not* raise, the speeches they do *not* make, and the influence they do *not* exert.<sup>50</sup> Most politicians aim to be responsible public servants, but their need to raise money encourages collaboration with the special interest groups and individuals who do business with government or are subject to government regulation. This compromises the integrity of the legislative and regulatory process.

### *D. Reform Must Free Politicians from Fundraising*

In order to raise the \$578,025 the average House incumbent spent to win reelection in 1992, members of Congress would have to raise \$5,666.91 every week of their two-year term. In order to raise the \$4,174,034 that the average incumbent raised for a Senate election, Senators would have to raise \$13,378.31 every week of their six-year term.

Former Congressman Bob Edgar (D-PA) resigned from Congress in frustration over the amount of time spent raising money. During an election, he said, "[e]ighty percent of my time, 80% of my staff's time, 80% of my events and meetings were fundraisers. Rather than go to a senior center, I would go to a party where I could raise \$3,000 or \$4,000."<sup>51</sup>

But challengers have a much harder task. While monied interests *want* to give money to incumbents, they are reluctant to invest in a challenger unless they are convinced that she has an excellent chance of winning. If they support

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49. PHILIP M. STERN, *THE BEST CONGRESS MONEY CAN BUY* 101 (1988).

50. *Id.* at 49.

51. *Id.* at 119.

a challenger who loses, they relinquish the privileged access that they have developed with the incumbent—access that originated on the basis of campaign contributions but that developed into a personal relationship, cultivated by additional campaign contributions, down through the years.

### *E. All Loopholes Must Be Shut*

Campaign contributions flow like a river. Partially damming a river does not stop the water flow but merely forces the water to carve new channels. The same thing has happened with campaign finance reform. Close one channel for campaign finance and another one appears. As the soft money loophole illustrates, one loophole can totally destroy the integrity and effectiveness of campaign finance reform.

## II. CURRENT PROPOSALS FOR REFORM

In his inaugural address, President Bill Clinton spoke to the American people about taking “bold” steps to “revitalize democracy”: “Our democracy must be not only the envy of the world but the engine of our own renewal. . . . Let us resolve to reform our politics, so that power and privilege no longer shout down the voice of the people.”<sup>52</sup>

On June 17, 1993, the U.S. Senate, by a vote of sixty to thirty-eight, approved S. 3, the Campaign Finance Reform Bill of 1993.<sup>53</sup> The bill was similar to the 1992 Campaign Finance Bill passed by Congress and vetoed by President Bush.<sup>54</sup> At a news conference after its passage, President Clinton called S. 3 “a vast advance over the present law in breaking the back of special interest domination of politics and elections.”<sup>55</sup> Despite the President’s enthusiasm, however, it is doubtful that S. 3 will lessen the influence special interests hold over the electoral process, even if it is ultimately passed by the House. The Senate’s Campaign Reform Act of 1993 does not, in our analysis, meet the minimum requirements for meaningful campaign finance reform.

The centerpiece of the Senate bill is a voluntary cap on campaign expenditures in the primary and general elections. The cap for the general election would vary from \$1.2 million to \$5.5 million, depending on a state’s population.<sup>56</sup> (The cap for primary elections would be sixty-seven percent of this

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52. *The Inauguration; “We Force the Spring”*: Transcript of Address by President Clinton, N.Y. TIMES, Jan. 21, 1993, at A1.

53. S. 3, 103d Cong., 1st Sess. (1993).

54. S. 3, 102d Cong., 2d Sess. (1992).

55. Beth Donovan, *Senate Passes Campaign Finance by Gutting Public Funding*, 51 CONG. Q. WKLY. REP. 1533 (1993).

56. S. 3, *supra* note 53, § 101.

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total.)<sup>57</sup> If adequately enforced, and if all loopholes were effectively closed, S. 3 would limit excessive spending in some Senate races. (Senator Jesse Helms, for example, whose \$17.7 million led the big spenders in the 1990 Senate election, would be limited to \$3.1 million under S. 3's population formula.)<sup>58</sup> However, in almost forty percent of the 1990 and 1992 Senate races, the actual money spent by the winning candidate was lower than S. 3's allowable cap.<sup>59</sup> In effect, the Senate has institutionalized the current high level of campaign spending. And in regulating the *amount* of campaign money rather than the *source* of campaign money, the Senate has missed the crucial issue behind the need for reform. Under S. 3, the tie between political candidates and special interest money will remain as tight as ever. Political success will continue to accrue to those candidates who raise the most money, and candidates will still have to spend exorbitant amounts of time raising money.

The major proposal before the House at the time of this writing, H.R. 3, reflects the House's determination to freeze in place current political fundraising and spending practices. The spending cap that has the most support in the House is \$600,000, which, as we have seen, is more than the \$543,599 that the average House winner spent in the 1992 election.<sup>60</sup>

As of this writing, there is strong sentiment among Democrats in the House for partial public financing of House elections (an idea rejected by the Senate). In the House scheme, eligible candidates would be entitled to up to one-third of the spending cap in communication vouchers to spend on advertising, postage, brochures, and other outreach material, and the first \$200 contributed by an individual would be matched by federal funds.<sup>61</sup> In many respects, the proposal resembles the system already in place for the presidential primaries. In theory, partial public financing guarantees every qualified candidate a minimum amount of money to finance an election campaign. But the concept of partial, as opposed to total, public financing does not assure a level playing field for challengers and incumbents. Meanwhile, the time-consuming race to raise private money will continue, as will the financial relationships between political candidates and individuals and organizations that have wealth and wield power.

The Senate bill and the House proposal reflect conflicting attitudes towards political action committees. The Senate bill prohibits campaign contributions

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57. *Id.*

58. OPEN SECRETS, *supra* note 23, at 2; Donovan, *supra* note 55.

59. Of the 50 Senate races contested in 1990 and 1992, the leading spender in 19 races spent less than the allowable cap in the S. 3 reform. Donovan, *supra* note 55.

60. PRICE OF ADMISSION 1992, *supra* note 37, at 8; Beth Donovan, *House Will Vote on Limits Nearing \$1 million in '96*, 51 CONG. Q. WKLY. REP. 3091 (1993) (once exemptions and inflation are factored in, the cap may be closer to \$1 million for many campaigns by the time the law takes effect).

61. Donovan, *supra* note 60, at 3093.

from PACs.<sup>62</sup> Incumbent members of the House, on the other hand, have historically been more dependent upon PAC contributions than have their colleagues in the Senate,<sup>63</sup> and many oppose restrictions on PACs altogether. At any rate, the focus on PAC money misdiagnoses the problem: a high proportion of campaign contributions comes from individuals who, like PACs, represent special interest groups.<sup>64</sup> Furthermore, the rules of disclosure are enforced more strictly for PACs than they are for individuals.<sup>65</sup> The evidence indicates that PACs in themselves are not a problem. Prohibiting or limiting campaign contributions by political action committees would in no way diminish the influence that special interests wield in Congress by virtue of their campaign contributions.

Spending caps are meaningless without the vigorous enforcement of all regulations, and the existence of just one loophole is enough to destroy totally the integrity of the reform. Neither S. 3 nor H.R. 3 completely closes the "soft money" loophole.<sup>66</sup> Soft money contributions to state political parties for use by federal candidates remain a potential conduit for undisclosed private contributions unregulated by the spending and contribution caps of the proposed reforms.<sup>67</sup>

S. 3 and H.R. 3 merely refine the flawed concepts of earlier federal election campaign acts. Reform legislation which does not separate special interest money from the democratic process, create a level playing field, dam existing loopholes, and anticipate new ones, is doomed to fail. A flawed reform is often worse than no reform at all, for a reform that does not work erodes public confidence, breeds cynicism about government, and encourages the political apathy and alienation that already mark our political life.

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62. S. 3, *supra* note 53, § 102.

63. OPEN SECRETS, *supra* note 23, at 6 (noting that House incumbents who were reelected in 1990 raised 48% of their money from PACs while incumbent Senators who were reelected raised just 22%).

64. *Id.* at 6, 22, 26-31. Senate incumbents who were reelected in 1990 raised 38% of their money from large (over \$200) individual contributors. The equivalent figure for members of the House of Representatives was 24%. Executives with Wall Street investment firms, the film industry, and lawyers and lobbyists gave most of their money as individuals rather than through PACs. *Id.* at 26.

65. The FEC has been lax in insisting that large individual contributors list their business and organizational affiliations. As Makinson writes about individual contributions, "[u]ntil now, little has been known about the details of that money—where it came from, who were the top contributors, and what were the patterns by which it was dispensed." *Id.* at 26 (identifying and classifying by industry and interest group 75% of the \$101 million given by individuals in contributions of over \$200 during the 1989-1990 election cycle).

66. In both the Senate and House bills, contributors can still give soft money to political parties for building funds and non-administrative office costs. See S. 3, *supra* note 53, § 321; Beth Donovan, *Democrats Float Draft Bill, But Schedule is Slipping*, 51 CONG. Q. WKLY. REP. 2940 (1993) (in the House bill, state parties are also allowed to fund 40 to 50 percent of generic party activity in federal races).

67. Donovan, *supra* note 66, at 2940.

## Democratically Financed Congressional Elections

### III. DEMOCRATICALLY FINANCED ELECTIONS

The Working Group on Electoral Democracy has drafted a proposal for Democratically Financed Elections to Congress that meets the criteria, as described above, for meaningful campaign finance reform. To our knowledge, it is the first detailed proposal for total public financing of both primary and general elections that effectively eliminates campaign contributions from all private sources. By using existing credit card technology and prohibiting all payments for campaign expenses by cash or check, it would be easy to administer and enforce. Though drafted with Congress in mind, the proposal can be adapted for presidential, state, and local elections as well.<sup>68</sup>

#### A. *A Voluntary System*

Democratically Financed Elections meet the constitutional requirements of *Buckley* by making public financing voluntary. Candidates have the option of rejecting public financing and raising campaign money from private sources as they do now.

##### 1. *Publicly Financed Candidates*

Candidates who voluntarily choose public funding must agree to accept no private money during the primary and general election campaign period, accept restrictions on the length and format of their television advertisements, and appear in broadcast debates. In return for their compliance, qualified candidates receive enough money (in the form of credit) to conduct competitive campaigns in the primary and general election races, free media time on television and radio, discount rates for additional broadcast advertising, and a franking privilege for challengers to neutralize the advantage that incumbents enjoy by their free use of the United States mail. Qualified candidates who choose public financing are also eligible to receive additional financing to match most expenditures of candidates who reject public financing. Publicly financed candidates may also receive additional financing to match independent expenditures directed against them.

Once candidates choose whether or not to accept public financing, they must stick to that decision. Candidates who reject public financing for the primary election cannot accept it in the general election. Similarly, candidates who accept public financing for the primary cannot reject it for the general election.

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68. Legislation based on the Working Group's proposal for Democratically Financed Elections has been introduced in the Maine legislature and is being prepared for introduction in Massachusetts, Missouri, Rhode Island, and Wisconsin.

## 2. *Privately Financed Candidates*

Candidates who reject public financing would be at a disadvantage. Although no limit can be placed on a candidate's use of personal wealth to run for office, the proposal places a limit of \$100 on all individual or organizational contributions and stipulates that all such contributions must be raised in the district or, in the case of a Senate candidate, the state of the electoral race. Privately financed candidates would also have to state in all their media ads that they are financing their campaign through private contributions. Since publicly financed candidates will be entitled to receive additional credit to match most of the "excess" expenditures of privately financed candidates, there would be little incentive for a privately financed candidate to pour excessive amounts of personal wealth into a race.<sup>69</sup>

To prevent privately financed candidates from pouring money into their campaign during the last two weeks (so that publicly financed opponents would not have time to respond), the proposal requires that privately financed candidates declare to the FEC two weeks before the end of the relevant campaign period, the amount of money they intend to spend during the last two weeks of the campaign.

### B. *The Primary Season*

#### 1. *Seed Money*

It takes money for candidates to "test the waters," to explore their potential as candidates for elected office and to gather sufficient support to qualify for public financing in the primary. For this reason, prospective candidates will be allowed to raise a limited amount of private, pre-primary "seed" money during the designated Public Financing Qualifying Period that will last from the day after the general election to the day before the start of the formal Primary Election Campaign Period. Contributions from adults residing in the prospective candidate's state or district would be limited to \$100 per candidate. There would also be a cap on the amount of seed money a candidate could spend.<sup>70</sup> All contributions over twenty-five dollars would have to be reported

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69. There must be provisions to protect the U.S. Treasury from being drained by extravagant private campaigns. The proposal therefore sets a limit of 500% of the original line of credit that a publicly financed candidate is entitled to receive in order to match the spending of a privately financed rival. Beyond that, public opinion must play a role. Privately financed candidates who are willing to spend over five times the amount of money that publicly financed candidates are entitled to receive will probably be criticized by the media and the public for trying to buy the election and for being hostage to the special interests who are supporting their profligate spending.

70. For a House race, the amount would be \$15,000; for a Senate race, \$15,000 plus \$2,500 for every congressional district in the state above one.

## Democratically Financed Congressional Elections

to the FEC under new rules of disclosure. A candidate would not be allowed to use privately raised seed money during the primary and general election campaign periods.

Some people, for reasons of health, family, or business responsibilities, cannot volunteer their time in political campaigns but want to support candidates of their choosing. The provision for seed money gives all citizens the ability to assist their favorite candidates. The \$100 cap on individual contributions diminishes the power broker role of special interests while enhancing the influence of ordinary voters who, under this provision, can give money when it counts for the important purpose of enabling their candidate to qualify for public financing. Under Democratically Financed Elections, ordinary citizens would pre-screen the candidates by providing them with the start-up money necessary to run competitive campaigns.

### *2. Candidate Scholarships*

In *Buckley*, the Supreme Court ruled that making financial contributions to one's own campaign is a protected right of free speech. However, the system, as it currently operates, discriminates against qualified candidates who, because of their low income or the nature of their jobs, are implicitly prevented from running for elected office. For these candidates, Democratically Financed Elections will provide campaign scholarships during the primary and general campaign periods.<sup>71</sup> These scholarships will go to challengers only; incumbents, by virtue of their congressional salaries, will have the financial resources to run for reelection. Many challengers will have families to support and various payments to meet during the campaign season. Without financial resources, they will not be able to leave their jobs in order to run for public office. Wealthy people, by contrast, have investment income and bank accounts in reserve. Many white-collar professionals, in addition to their savings and investments, also remain on salary during their election run. Campaign scholarships are thus essential to a fair and democratic election system. They are an important means of ending the hold that the wealthy have over Congress and other legislative bodies.

### *3. Qualifying for Public Financing in the Primary Election*

Establishing eligibility for public financing is distinct from the process of

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71. Candidate scholarships must have strict guidelines. The proposal suggests that a scholarship be no more than \$2,000 a month plus \$500 a month for each dependent, to be paid only during the actual primary and general election campaign periods. Eligibility for scholarships will be determined by a means test established by the FEC based on the candidate's yearly income as determined from income tax returns from the previous two years.

qualifying for the ballot. Under current law, ballot access is an issue of state law. Under this proposal, however, a candidate who passes state requirements for ballot access must still pass a second, more difficult threshold to become eligible for public financing. The purpose of this threshold is to measure the potential of a candidate to win broad public support, not her ability to raise large sums of money.<sup>72</sup>

To qualify for public financing in the primary election, candidates will have to gather a specified number of low-dollar contributions from within their district or, in the case of U.S. Senate candidates, within the state in which they are running. These contributions represent a significantly greater commitment on the part of the contributor than a mere signature on a petition to place the candidate on the ballot. Each contribution must be accompanied by a signed receipt fully identifying the contributor and indicating that she fully understands the purpose of her contribution.

The amount of a Qualifying Contribution is, of course, subject to debate.<sup>73</sup> We have set the figure at five dollars, which is low enough to be affordable for even the poorest of citizens. The exact number of Qualifying Contributions necessary to qualify a candidate is also debatable. While the requirements for public financing should be low enough so as not to present a barrier to independent candidates and candidates from new or insurgent parties, they should be high enough so that all candidates are forced to stretch beyond their immediate circle of supporters. Certainly, if the number of Qualifying Contributions is set low, some eccentrics are going to meet the threshold of eligibility. In areas of the country where extremism is a powerful force, extremist candidates will qualify for public money—as well they should. Democracy, by its very nature, is a messy affair. Better that a few David Dukes get public money because they can prove popular support than have good candidates impeded in their efforts to run serious campaigns because, despite public support, they lack access to large sums of money. Under the current system, a few wealthy backers can transform an otherwise marginal politician into a serious candidate. Wealthy individuals with no other qualification than a willingness to spend their own personal money can become serious candidates as well. In contrast, the proposed system emphasizes the *number* of contributions rather than the amount of money collected.

The proposal for Democratically Financed Elections sets the number of Qualifying Contributions at 1,000 per congressional district. Senate candidates would be required to raise 1,000 Qualifying Contributions plus an additional

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72. This qualification, because it involves federal money, can be regulated by Congress. It is similar to the current system of partial public financing of the presidential primary—a system that has already been found constitutional. *Buckley v. Valeo*, 424 U.S. 1, 104 (1976).

73. Indeed, all the numbers offered in this proposal are suggested figures. Because the concept of total public financing of primary and general elections has never been attempted, there is no empirical data on which to base our numerical assumptions.



## Democratically Financed Congressional Elections

250 Qualifying Contributions for every congressional district in their state.

### 4. *Public Financing of the Primary Election*

Party candidates who raise the required number of Qualifying Contributions will each get an equal amount of public money (receivable as a line of credit) for the primary campaign. The proposal allows \$100,000 for each eligible House candidate. Each Senate candidate is allotted \$100,000 plus an additional \$50,000 for each congressional district in the state above one. Again, as with all our numbers, these figures are open to debate.<sup>74</sup> The amount of credit candidates receive should be sufficient to enable challengers to run competitive races against better-known incumbents.

The primary election serves a dual function under Democratically Financed Elections. Not only does it determine a party's candidate in intra-party competition, as it does at present, but it also provides a fast-track qualifying test for candidates of new or third parties. Third-party candidates would become eligible for public financing in the general election if, as explained in the next section, their party received a qualifying percentage of the total vote cast in the primary.

Making the primary a qualifying test for public financing will make primary elections more interesting for the public and more competitive for the candidates. Heavily favored candidates in traditional one-party districts will, under this system, have to run hard in the primary if only to prevent new parties from establishing their eligibility for public financing. Whether a state has a closed primary or an open one is not important under this system. In each case, political parties will have an interest in maximizing their vote. A party candidate with weak or no primary opposition must still get enough supporters to the polls to meet the qualifying threshold for public financing in the general election. An unopposed party candidate who raises enough Qualifying Contributions to become eligible for public financing in the primary will have the same resources as the individual candidates in an exciting and tightly contested primary.

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74. Data breaking down campaign expenditures are sparse. One study shows that House candidates in 1990 spent an average of 17.69% of their expenditures on fundraising and Senate candidates spent 30.8%. SARAH FRITZ & DWIGHT MORRIS, *HANDBOOK OF CAMPAIGN SPENDING IN THE 1990 CONGRESSIONAL RACES* 8-9 (1992). Publicly financed candidates will not have to spend any money for fundraising. In addition, their media costs will be reduced.

### *C. The General Election*

#### *1. Qualifying for Public Financing*

While it is the individual candidate who must establish her eligibility to receive public financing in the primary election, it is the political party that has to establish eligibility for its candidate in the general election, with the winner of each party's primary receiving the public funds. This is an important distinction that seeks to balance the role of political parties with that of individual candidates. Rival candidates in a party primary will still want to beat one another out for their party's nomination, but they will also want to maximize the vote of their party to prevent primary candidates from new or third parties from gaining enough votes in the primary to establish their eligibility for public financing in the general election.

The mechanism by which a party establishes its eligibility for public financing in the general election is the Combined Party Vote. This represents the total of votes cast for all candidates competing in the primary. The winning candidate of a party whose candidates receive a combined party vote of more than 20% of the total vote cast in the primary election would qualify for full public financing in the general election. For example, if a party has two candidates in its primary and one candidate gets 14% of the total vote and the other candidate gets 7% (neither of which would qualify them individually for public financing), their combined party vote would be 21%, enabling the party to qualify for full public financing, with the money going to the winning candidate who got 14% of the vote.

For the general election, the proposal allocates \$150,000 for a candidate for the House of Representatives. Each Senate candidate is allotted \$150,000 plus an additional \$75,000 for each congressional district in a state above one. Winning primary candidates of a party whose combined party vote is between five and twenty percent would receive a proportional amount of public financing.<sup>75</sup>

#### *2. Independent Candidates*

Although Democratically Financed Elections are biased toward a strong

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75. For example, a candidate of a party whose candidates together receive 10% of the total popular vote in the primary election would be entitled to 50% of total public financing since 10% is one-half of 20%, and so on. Publicly financed primary candidates whose political parties qualify for proportional public financing in the general election are prohibited from raising and spending any additional money from private sources. As these candidates would be receiving proportional media benefits and mass mailing privileges, they would have the resources, without the addition of private money, to wage campaigns that reflect their proven public support.

## Democratically Financed Congressional Elections

and cohesive party system, the plan does not unduly discriminate against independent candidates who run without an affiliated political party. Independent candidates do not run in the primary election. In order to qualify for public financing in the general election, they collect Qualifying Contributions, like all other candidates, but must collect a higher number than candidates who represent political parties. The number must be high enough to dissuade individual candidates from abandoning their party affiliation so that, by running as independents, they can jump directly into the general election. We suggest that an independent candidate must raise, during the Public Financing Qualifying Period, at least 125% of the number of qualifying contributions required of a party candidate to qualify for public financing in the primary election.

Independent candidates who meet the 125% threshold would receive full public financing for the general election. However, without an opportunity to make their name and views known during the primary election, they would be at a disadvantage against candidates who had public financing in the primary as well as the general election. To enable an independent candidate to campaign actively during the primary election period, the proposal offers them the possibility of obtaining proportional public financing for that period. Thus, independent candidates who raise 150% of the threshold for qualifying contributions would get half of what party candidates get in the primary election, while those who raise 175% would get three-quarters the amount. Those independent candidates who raise twice the number of qualifying contributions would get full public financing in the primary election.

### 3. *Political Parties*

All campaign finance laws have an impact on political parties. The current system of privately financed campaigns, for example, has greatly weakened the party system.<sup>76</sup> Individual candidates no longer need to look to their party for support. More important than the identification of party affiliation is the money candidates get from non-party financial sources. By prohibiting campaign contributions from private sources, our proposal weakens the tie between special interests and political candidates. In so doing, it strengthens the tie that binds political candidates to political parties.

As private associations, parties can, of course, raise private money. Requiring political parties to accept only public financing would therefore be unconstitutional—and undesirable. It is true that providing public financing to political parties for general campaign expenditures would assure that all

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76. See BROOKS JACKSON, *HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS* 296 (1988); LARRY J. SABATO, *THE PARTY'S JUST BEGUN: SHAPING POLITICAL PARTIES FOR AMERICA'S FUTURE* 71-75 (1988).

qualified parties—even those without financial backing from wealthy interests—have some operating capital to conduct electoral campaigns. But public financing of political parties would greatly add to the expense of publicly financed elections and complicate administration. Furthermore, as parties have the right to raise private money, public financing of political parties would not sever the connection between politics and private special interest money—it would merely allow parties to collect public money in addition to what they get from special interest sources.

For the sake of simplicity and economy, this proposal rejects public financing of political parties. Instead, in order to lessen the tie between politics and private money, it places a limit of \$100 on the amount an individual or an organization can give to a national political party.

Because of the potential for abuse,<sup>77</sup> national parties will not be able to pass money to individual candidates. Yet, because it is desirable that parties have some influence over their candidates, national parties would be able to transfer money to state and local parties to finance in-kind expenditures on behalf of individual candidates up to a value not to exceed ten percent of the amount the individual candidate receives in public financing. This provision would enable parties to give valuable in-kind support to candidates who adhere to the party's platform and policy. This provision would encourage party-financed grassroots activity, such as get-out-the-vote drives, organizing volunteers for informational canvassing, the staffing of phone banks, and the distribution of buttons, lawn signs and other campaign paraphernalia, which represent legitimate in-kind activities. It would be against the law, however, to use party money to finance a candidate's media advertising.

The crucial point of this provision is to grant political parties a means to influence individual candidates. For example, candidates who win a party's nomination but do not follow the party's program may, at the discretion of the party, not get their party's assistance, while candidates who do follow the party program may, at the party's discretion, get additional help. Similarly, candidates in a tight race may get more assistance than candidates who are sure winners or sure losers. Which candidates receive national party assistance is determined by negotiations between the candidates and national, state, and local party officials. The influence thus acquired is minor, however; the assistance is worth no more than ten percent of what a candidate is otherwise eligible to receive in public finance credit. As this advantage is based on the relationship between candidates and a political party rather than on the relationship between candidates and their ability to raise special interest money, the compromise does not violate the goal of severing the connection between

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77. For example, a corporation or organization might collect \$100 contributions from all of its members and give the bundle of checks to a political party, making it clear that, although the checks are signed by individuals, the money represents a contribution by the institutional entity.

## Democratically Financed Congressional Elections

public politics and private money. To the degree that this provision strengthens the role of political parties at the expense of special interest money, the minor tilting of the playing field is, we believe, worth it.

### D. *Educating Voters*

#### 1. *Voter Information*

To assure that each voter has, at a minimum, the basic facts of a candidate's ideas and positions, the proposal for Democratically Financed Elections will require that the Federal Election Commission provide grants and establish guidelines for Voter Information Programs in each state. Such programs will be administered by non-partisan voter education groups, members of the media, representatives of political parties, and other interested citizens.

Voter Information Commissions would be authorized to organize and sponsor candidate debates, allocate broadcast time under the provisions for free media, and research, publish, and distribute by mail Voter Information Packets to include biographical material from each candidate, statements by the candidates on designated issues, and the voting record, when pertinent, of every candidate. The goal of the commissions would be to serve the public as an objective *complement* to the efforts of the candidates' own personal campaigns. In no way should Voter Information Programs infringe on the First Amendment rights of the candidates by regulating the quality, style, or content of a candidate's public presentation.

#### 2. *Franking*

Incumbents have a large advantage over their challengers because of the congressional franking privilege. Rather than curbing this privilege, as some have proposed,<sup>78</sup> we would extend it to those challengers who have qualified for public financing. All such candidates would be eligible to send one free mailing to all the residents in their district or state during the primary election and again during the general election campaign. Candidates of political parties who have qualified for proportional public financing would be entitled to this same minimal right. While incumbents could still send out franked mail in reply to constituent letters and use their franking privilege to conduct other normal business, they would only be allowed these two mass mailings during the formally-designated primary and general campaign periods. Both incumbents and challengers would, of course, be allowed to send out other campaign mailings at the regular cost.

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78. As currently drafted, only the Senate bill bans franking. S. 3, *supra* note 53, § 715.

### 3. *Free Media*

Free media for political candidates is commonplace in other countries. According to one recent study, "the United States is the only developed democracy which does not offer this type of support to parties or candidates."<sup>79</sup> But the idea that television and radio should provide free time for political programming has long been considered an important component of campaign reform. The ideas presented here are not new and can be promoted independently of the proposal for Democratically Financed Elections.<sup>80</sup> The legal rationale for free media is based on the Communications Act of 1934, which asserts government ownership of the airwaves, and in particular on Section 301(a), which requires that broadcast licenses promote the "public interest, convenience and necessity."<sup>81</sup> The requirement that broadcast stations set aside time for public service announcements is a precedent for the idea that broadcast stations should set aside time for political announcements. As the Center for Responsive Politics has stated, broadcasters have a hybrid status: "they possess private rights, but public responsibilities."<sup>82</sup> This is not to say that broadcasters, politicians, political parties, public interest groups, and other interested parties will not hesitate to challenge these provisions in court.<sup>83</sup> But we contend that existing law allows the government to require broadcast stations to set aside time for political programming.<sup>84</sup>

Under the proposal for Democratically Financed Elections, publicly financed candidates will be allotted free media time in one- to five-minute slots on the following basis:

- (a) House candidates will receive fifteen minutes for the primary and thirty minutes for the general election campaign.
- (b) Senate candidates will receive thirty minutes for the primary and sixty minutes for the general election campaign.
- (c) Candidates of parties that qualify for a proportional amount of public financing in the general election would get one-half the free media time allow-

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79. THE CENTER FOR A NEW DEMOCRACY & THE CENTER FOR RESPONSIVE POLITICS, *THE WORLD OF CAMPAIGN FINANCE: A READER'S GUIDE TO THE FUNDING OF INTERNATIONAL ELECTIONS* 7-8 (1993).

80. See, e.g., THE TWENTIETH CENTURY FUND, *VOTER'S TIME: REPORT OF THE TWENTIETH CENTURY FUND COMMISSION ON CAMPAIGN COSTS IN THE ELECTRONIC ERA* (1969) [hereinafter *ELECTRONIC ERA*]; THE CENTER FOR RESPONSIVE POLITICS, *BEYOND THE 30-SECOND SPOT: ENHANCING THE MEDIA'S ROLE IN CONGRESSIONAL CAMPAIGNS* (1988) [hereinafter *30-SECOND SPOT*].

81. 47 U.S.C. §§ 309(a), 315(a) (1988) ("the obligation imposed upon [broadcasters] under this chapter to operate in the public interest"); see also *30-SECOND SPOT*, *supra* note 80, at 24-25.

82. *30-SECOND SPOT*, *supra* note 80, at 25.

83. See, e.g., *Senate Campaign Finance Proposals of 1991: Hearings on S. 3, S. 6, S. 7, S. 53, S. 91, S. 128, S. 143, S. 294 and S. Res. 70 Before the Senate Comm. on Rules and Administration*, 102d Cong., 1st Sess. 233-253 (1991) (Memorandum submitted by National Association of Broadcasters).

84. For a thorough discussion of the constitutional issues involved, see *30-SECOND SPOT*, *supra* note 80, at 24-42.

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ance of party candidates who qualify for the full public financing.

### 4. *Problems of Free Media*

Free media raises complex but not unsurmountable logistical problems. Urban glut, for example: How do TV stations provide free media in urban areas that incorporate many congressional districts? One solution would be to limit the free media time any one TV station has to provide during the campaign period and divide the races between the available stations. Thus, if New York had twenty stations to cover its forty races, each station would cover two races. Another solution would be to exempt areas where urban glut is a problem and make alternative provisions. For example, in a city like New York where television advertising in congressional races has not been important, candidates might give up their right of free media for an additional franking privilege.<sup>85</sup>

In addition to worrying about urban glut, broadcasters are reluctant to interrupt or drop prime-time programs for political messages. Viewers do not like to see their favorite programs interrupted for political ads. In 1970, the FCC set aside a "prime-time access period" between 7:30 p.m. and 8:00 p.m.—after the evening news but before the network shows—for public service programming.<sup>86</sup> If, for a few weeks during the primary and general election periods, television stations were required to set aside this half-hour period for free media programming, the problem would be solved and the public would have a definite time of day in which to tune in (or tune out) political discussion. The Voter Information Commissions in the various states would have the authority to regulate the system of free media to suit local needs and traditions.

### 5. *Guaranteed Advertising Rates*

Candidates who qualify for public financing would also be entitled to purchase advertising time, in blocks of one minute or more, on all radio and television stations at rates not exceeding the rates charged to other customers during the time period when the candidate ads are scheduled to be broadcast.<sup>87</sup> To receive this guaranteed rate, candidates would have to appear in person on TV and use their own voice on radio for at least fifty percent of the broadcast time. Some will object that this regulation violates a candidate's right to free speech, and the objection is well taken.<sup>88</sup> Campaign finance law

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85. For a discussion of urban glut, see *id.* at 47-57.

86. *Id.* at 57-58. See also ELECTRONIC ERA, *supra* note 80, at 33.

87. A similar provision for discount media rates is included in the Campaign Finance Reform Bill of 1993, S. 3, *supra* note 53, § 131.

88. See, e.g., Timothy J. Moran, *Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech*, 67 IND. L.J. 663, 667-70 (1992).

should not seek to regulate the substance of candidate ads nor should it impose a subjective value of what constitutes quality advertising. Precedent for regulating political advertising *format*—as opposed to political advertising *substance*—is established, however. Currently, campaign advertisements are required to include a tag line identifying the committee paying for the advertisement. Candidates who choose to raise their money from private sources would not have to adhere to the mandated format. They would, however, have to provide a tag line declaring that the advertisement was paid for by campaign contributions from private sources.

## E. *Enforcement*

### 1. *Soft Money*

Because this proposal governs federal elections, it cannot regulate private contributions to state political parties. At present, contributions to state parties are routinely used to evade federal regulations. Soft money represents campaign contributions that are, in effect, laundered by state parties for use in federal campaigns. The proposal for Democratically Financed Elections closes this loophole by prohibiting a candidate from spending money that does not come through the FEC-administered credit card system. As an added prohibition, it requires that any candidate expenditure mentioning a federal candidate, even if it is part of an expenditure extolling the merits of the state party's ticket, must come from the federal candidate's publicly financed line of credit.

### 2. *Enforcement by Credit Card*

Democratically Financed Elections will be relatively easy to enforce. Eligible candidates who agree not to accept or spend private money will receive not money but *credit* from a federal account regulated by the Federal Election Commission and administered, under contract to the FEC, by an existing credit card company. Each candidate and designated staff members will receive a special FEC "Fair Election" Credit Card (much like a VISA or Mastercard) with which they will make all campaign purchases and pay their bills. It will be a violation of the law to pay cash or by check for any major expense relating to the election, and all payments, except utility bills, will have to be made at the time of purchase. Upon completing a sale, the vendor will be required to report the sale to the credit card company just as it would if it were processing a VISA account, and the credit card company will deduct the expenditure from the candidate's line of credit. With one telephone call the treasurer of a campaign will be able to keep a daily record of the candidate's credit balance just as credit card customers can keep daily records of their own



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credit card balance now.

The advantages of the credit card system are simplicity, convenience, and easy and instant monitoring and enforcement. Under the current system, candidates have to hire bookkeepers, lawyers, and accountants just to deal with the FEC's disclosure forms, and the FEC's staff has to enter all the data on the forms into its computer system. Under the proposed credit card system, there will be no contributions to monitor once the primary campaign period gets started, and all the credit card expenditures can be easily downloaded into the FEC's computers. Under the current system, the FEC has neither the authority nor the resources to audit individual candidate campaigns.<sup>89</sup> Candidates who are proven to have violated the campaign finance laws can negotiate a settlement, a process that can take many months and even years, and is rarely reported in the press.<sup>90</sup> As monetary settlements usually represent a small percentage of the campaign money that was illegally raised and spent, bending or ignoring the rules is tempting.<sup>91</sup> Under the proposed system, two simple regulations are needed to guard against violations of campaign finance rules. Any candidate who makes payment for a campaign expense by any means other than with the credit card is guilty of a violation, and any candidate who uses public money for personal use or gain is guilty of criminal fraud. The use of credit card technology will make monitoring fraudulent campaign expenditures easy.

The few complexities inherent in this credit card system do not compromise its actual effectiveness. The proposal provides an allowance for the spending of petty cash for meals, snacks, newspapers, phone calls, and other minor necessities of an election campaign. Payment for big budget items (e.g., media advertising, staff, consultants, travel, office expenses, polling, printing, mailing, etc.) would be by credit card at the time of purchase. In budgeting projected expenses, candidates would have to estimate the cost of utilities. The FEC could provide a formula for such estimates and, in cooperation with telecommunications companies, develop a means for the daily monitoring of candidates' bills. The enforcement mechanism would seek to balance flexibility with caution. The credit card system should deal only with important campaign expenses.

The existence of absolute spending limits creates the need for candidates to adhere to a strategic spending plan. Once campaigns have exhausted their line of credit—even if it occurs weeks before the end of the campaign—candi-

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89. JUSTICE DELAYED, *supra* note 24, at 12.

90. *Id.* at 13-15.

91. For example, in the 1984 presidential election, the FEC questioned the legality of \$3 million in privately raised money that was spent by the "Reagan-Bush '84" campaign committee. In April 1990, more than five years after the suspect expenditure was made and over a year after President Reagan had left office, Reagan's campaign committee acknowledged its violation of the law and agreed to a fine of \$2,500, a small price, indeed, for the \$3 million illegally but effectively spent. *Id.* at 17-18.

dates cannot spend any more money for their election. Under this system, candidates would have to budget carefully—a useful discipline for prospective legislators.

### 3. *Independent Expenditures*

One potential hemorrhaging point remains: that of money spent by private citizens or independent political groups on behalf of a candidate without the candidate's participation or knowledge. *Buckley* shields these independent expenditures as protected free speech.<sup>92</sup> It is likely that under the system of Democratically Financed Elections, independent expenditures will become a channel by which special interest groups spend money to support or oppose particular candidates. Barring a successful challenge to *Buckley*, this proposal cannot prohibit independent expenditures; it can only discourage or offset their use as a campaign tactic. To do this, the proposal requires that individuals and organizations planning to make an independent expenditure notify the FEC within forty-eight hours after the expenditure is made, indicating in a sworn affidavit which candidates their expenditure is intended to oppose or support. This disclosure would free an additional amount of credit, equivalent to the cost of the independent expenditure, for use by the targeted candidates. Those planning to make independent expenditures during the last two weeks of the campaign must, before the final two-week period begins, notify the FEC of their intention, submit the above affidavit, and declare the amount of money they intend to spend during the last two weeks of the campaign. By providing additional credit to candidates who are targets of independent expenditures, Democratically Financed Elections should effectively deter their use.

### F. *Cost of Democratically Financed Elections*

Because Democratically Financed Elections represents a new concept of reforming campaign finance law, it is impossible to predict absolutely its cost to the taxpayer. A generous estimate would place the cost of total public financing of both the primary and general election at under \$500 million a year, or less than five dollars for each federal taxpayer.<sup>93</sup>

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92. *Buckley v. Valeo*, 424 U.S. 1, 24 (1976).

93. This figure is based on the following assumptions:

*Congressional Primary:* Every two years, 435 House seats are contested. We estimate three primary candidates for each party for each seat, and a seventh candidate reflecting an eligible third party. Each candidate gets \$100,000 for the race, for a total of \$304,500,000 or \$152,250,000 per year for the two-year election cycle.

There are 100 Senate races in every six-year cycle. We again estimate seven primary candidates for a total of 700 candidates. Each candidate gets \$100,000 plus an additional \$50,000 for every congressional district in the state. Thus 700 candidates x \$100,000 = \$70 million, plus 435 congressional districts x \$50,000 = \$21,750,000 x 7 candidates per district = \$152,250,000. This totals \$222,250,000 per six year

## Democratically Financed Congressional Elections

These figures are obviously rough estimates. The institution of Democratically Financed Elections may encourage even more qualified candidates than our estimate anticipates. But compared with the billions of dollars monied interests currently wrest from Congress in the form of corporate and industry bailouts, tax breaks, subsidies, regulatory exemptions, and other forms of special interest legislation, the cost to the taxpayer for total public funding of all federal elections would represent real savings.<sup>94</sup>

### IV. POLITICAL PROSPECTS

The American public seems open to the idea of campaign finance reform, although its ideas about the specifics are unfocused and inchoate. Recent polls and focus groups indicate that many Americans fully understand the corrupting influence that campaign contributions from private sources have on our electoral system, and that they would support comprehensive measures to reform the electoral process.<sup>95</sup>

The ideals of democracy—equal political opportunity, fair and honest elections, and government accountability—still resonate in the American culture. Democratically Financed Elections could be the cutting edge of a

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cycle, or a total yearly cost of the Senate primary of \$37,041,000.

*Congressional General Election:* For the House, we estimate 1,000 candidates (870 major-party and 130 third-party candidates) at a cost of \$150,000 a race for a total of \$150 million or \$75 million for each year of the two-year cycle.

For the Senate, we estimate 250 candidates (200 major-party plus 50 third-party candidates per six-year election cycle). Each candidate is awarded \$150,000 plus \$75,000 per congressional district. Thus, 250 candidates x \$150,000 = \$37,500,000, plus 435 congressional districts x \$75,000 per candidate x 2.5 candidates per race = \$119,062,500 per six-year cycle, or \$19,843,700 per year.

Under these assumptions, publicly financed candidates would get \$284,134,700 for their primary and general election campaigns. Add to this the additional funds that some of these candidates will need to match independent expenditures waged against them and to match the excess spending of privately financed candidates. Further add the administrative costs of the Federal Election Commission. Its 1990 budget was \$18,808,000. But as the FEC will no longer have to monitor thousands of separate contributions from private citizens and political action committees, and the expenditures of the publicly financed candidates will be monitored electronically by the credit card system, the FEC's operating costs, after the system is established, could conceivably go down.

94. See, e.g., *A Case of Legal Corruption*, U.S. NEWS & WORLD REPORT, Nov. 7, 1988, at 20-23; *What Dollars Can Buy*, U.S. NEWS & WORLD REPORT, Nov. 7, 1988, at 23-24 (describing "the 15 most egregious congressional boondoggles" in which special interests received billions of dollars in Congress-approved favors as payment, the magazine charges, for campaign contributions to influential members). For major muckraking treatments of this issue, see BROOKS JACKSON, *supra* note 76, and STERN, *supra* note 49.

95. For example, in one recent poll, 85% said that campaign contributions buy the loyalty of candidates for public office; 83% thought that campaign contribution of special interests have more influence than the voters; and 74% believe that Congress is largely owned by the special interests. GORDON S. BLACK, *THE POLITICS OF AMERICAN DISCONTENT: A STUDY OF VOTER DISCONTENT* 9-11 (1992).

Although public financing, because it means giving taxpayer money to political candidates, has always been considered a "hard sell," 79% said they would support public financing of congressional elections if it would encourage better candidates to run against incumbents, and 76% would support public financing if it was tied to the elimination of PAC contributions. *Id.*

genuinely patriotic movement to revitalize and make good on the promise of American democracy. By denying the rich the ability to vote with their money, ordinary voters would achieve the political power that is rightfully theirs. Ballots rather than dollars would determine who gets elected, what kind of public policies our legislators enact, and the measure of justice by which our country is run.

The proposal for Democratically Financed Elections, like the Nineteenth Amendment and the Voting Rights Bill of 1965, is a radical one. By its very boldness it recalls the visionary principles on which this country was founded. As Thomas Paine wrote in *Common Sense*: "a long habit of not thinking a thing *wrong* gives it a superficial appearance of being right and raises at first a formidable outcry in defense of custom. But the tumult soon subsides. Time makes more converts than reason."<sup>96</sup>

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96. THOMAS PAINE, *COMMON SENSE* 1 (1776).